

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION

LUIS RIVERA, :
PETITIONER, :
 :
V. :
 :
DAVID NOLAN, :
RESPONDENT. : NO. 04-12717-RCL

MOTION FOR RECONSIDERATION OF DENIAL OF SUCCESSIVE PETITION
OF WRIT OF HABEAS CORPUS BASED UPON EQUITABLE TOLLING

Now comes the petitioner Luis Rivera, acting pro se,
hereby moves this Honorable Court for Reconsideration of its
denial of his successive petitions for a Writ of Habeas Corpus
based upon Equitable Tolling pursuant to 28 U.S.C. §2244(d)(1)(2).
In support of this motion hereof the petitioner states:

1. This Honorable Court Reginald C. Lindsay, failed to
recognize that before him was a second successive petition for
a writ of habeas corpus and pursuant to 28 U.S.C. §2244(2) was
properly before the court.

2. On November 10, 2003, the petitioner filed his first¹
post conviction motion for a new trial.

3. On November 20, 2003, petitioners Rule 30 motion was
denied.

1. See 28 U.S.C. §2244(d)(2).

Page Two

4. Petitioner was not notified of the denial of his motion for a Rule 30 until March 1, 2004. See exhibit "A".

5. On April 2, 2004, I filed an application for leave to appeal which was transferred to the single justice Martha B. Sosman. Petitioner received notice on August 5, 2004.

6. On September 14, 2004, Martha B. Sosman, denied petitioner's motion for appointment of counsel.

7. Petitioner wrote to Justice Sosman, and she modified her order and she allowed the application for appeal on September 14, 2004.

8. On December 14, 2004 Justice Spina denied the petition for leave to file late appeal.

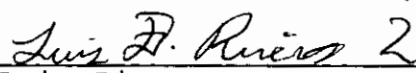
9. On December 20, 2004, petitioner filed second petition for a Writ of Habeas Corpus. The petition was docketed on January 3, 2005.

10. On June 17, 2005, Reginald Lindsay, District Court Judge denied the petition and issuance of a Certificate of Appealability. See exhibit "B".

It is the petitioner's contention that the Court abused its discretion when it denied the petition based on equitable tolling and then denied petitioner a certificate of appealability.

The petitioner respectfully requests a hearing on the merits of issuance of a certificate of appealability.

Respectfully Submitted
By The Petitioner


Luis Rivera pro se
MCI Norfolk
P.O.Box 43
Norfolk, Mass. 02056

Date: July 6th, 2005

CERTIFICATE OF SERVICE

I, Luis Rivera hereby certify under the pains and penalties of perjury that a true copy of my motion has been served upon the Assistant Attorney General for the Commonwealth of Massachusetts. By first class prepaid first class mail to his address on this day.

Date: 7-6-05

Luis F. Rivera S.

EXHIBIT A

COMMONWEALTH OF MASSACHUSETTS
HAMPDEN, SS. SUPERIOR COURT DEPARTMENT
Nos 91-2247 thru 91-2251

COMMONWEALTH

V.

LUIS RIVERA

HAMPDEN COUNTY
SUPERIOR COURT
FILED

MAR - 9 2004

Shirley J. Magg
CLERK-MAGISTRATE

NOTICE OF APPEAL OF NEW TRIAL MOTION DENIAL RECEIVED
MARCH 3, 2004 WITH MOTION JUDGE FORD ORDER CLERK TO
ENTER MARCH 1, 2004 LATE NOTICE ON DOCKET FOR PURPOSE
OF 30 DAY LIMITED C.278, SECTION 33E S.J.C. APPEAL

Now comes the defendant and, pursuant to Appellate Rules 3, 4 and 14(b), files his notice of appeal from the clearly erroneous abuse of discretion of Judge Ford denying a Rule 30(b) motion for a new trial purportedly on November 20, 2003, which the clerk gave first notice of by mailing such decision on March 1, 2004, where only 30 days are allowed for filing a c.278, § 33E single justice gatekeeper application for leave to appeal, COMMONWEALTH V. MAINS, 433 Mass 30, 37 n.10 (2000) and Judge Ford is known for cheating defendants out of appeals by a pattern of either backdated rulings, or maliciously late notice. see e.g. COMMONWEALTH V. THOMAS, Berkshire# 98-922 (Ford, J. Rule 30 denial on 8/30/02 given notice of on 9/19/03 late appeal pending after Ford refused to correct error on 2/13/04).

The defendant shall be filing his SJC Single Justice petition winning reversal for a full evidentiary hearing within 30 days of the March 1, 2004 late notice and suggests that Judge Ford make required Rule 30(b) findings of fact at this time with respect to the several meritorious grounds presented in the pro se new trial motion.

March 6, 2004

MOST RESPECTFULLY SUBMITTED,

COPY SERVED ON HAMPDEN

COUNTY DISTRICT ATTORNEYS OFFICE

Luis P. Rivera de
Luis Rivera pro se
PO Box 100
S. Walpole, MA. 02071

COMMONWEALTH OF MASSACHUSETTS
HAMPDEN SS. SUPERIOR COURT DEPT.

COMMONWEALTH
V.

No. 91-2247 THA
91-2251
HAMPDEN COUNTY
SUPERIOR COURT
FILED
NOV 10 2003
Marie S. Magg
CLERK-MAGISTRATE

LUIS RIVERA

DEFENDANT'S FIRST VERIFIED
MASS. CRIM. P. RULE 30 (b) MOTION
FOR A NEW TRIAL WITH EVIDENTIARY
HEARING AND ASSIGNMENT OF COUNSEL REQUESTS

Now comes the defendant, in the
Above-entitled matter, and moves this court
FOR A NEW TRIAL pursuant to MASS. CRIM. P.
Rule 30 (b), while requesting an evidentiary
hearing and also requesting assignment
of counsel for such hearing pursuant to
S.J.C. Rule 3010 and MASS. G.L.C. 211D 314
Presenting the following meritorious grounds
ONE Issue of ineffective appellate counsel
GROUND TWO Issue of both the prosecutor
and TRIAL Judge misstating the meaning of
REASONABLE DOUBT GROUND THREE Issue of
INEFFECTIVE TRIAL counsel who failed to
- Lot -

ALL STATEMENTS MADE HEREIN ARE MADE UNDER
PAIN AND PENALTY OF PERJURY AND ALL TRIAL
TRANSCRIPT CITATIONS ARE TRUE AND ACCURATE.
ALSO AFFIDAVITS FROM Jose Pacheco and Pamela Abon.

I have a fairly clear memory of the witness Jose Pacheco's testimony, having heard
it twice - both at this trial and at the trial of a co-defendant, Ivan Diaz. I
simply do not believe his alleged recantation, having given the witness serious consideration.
See Commonwealth v. Raymond, 424 Mass. 382, 397 (1997). The other allegations set forth
herein do not raise a substantial issue requiring an evidentiary hearing. Therefore, the motion
is denied without a hearing. 04/08/03

HAMPDEN, SS,

SUPERIOR COURT DEPT.

No. 91-2247 THRU

91-2251

COMMONWEALTH

V.

LUIS RIVERA

HAMPDEN COUNTY
SUPERIOR COURT
FILED

NOV 10 2003

Charles Shagga
CLERK-MAGISTRATE

Denied
11/2/03
Dadon
11/20/03

MOTION FOR ASSIGNMENT OF COUNSEL AND
FOR SCHEDULING OF FOLLOW UP EVIDENTIARY HEARING

Now comes the defendant and
moves this court to overrule C.P.C.S.
cover up of attorneys Black and Couture's
ineffective assistance and misconduct
of attorney Stephenson and the prosecutor
by directly assigning counsel of
pursuant to S.J.C. Rule 3:10 and MASS.
GIL CHAPTER 211D §14 and for scheduling
an evidentiary hearing counsel is
necessary for COMMONWEALTH v HILL
432 MASS 204 710 N.15 (2000) CATHY FERRARA
exposing prosecutorial misconduct, as supported
by attached transcript pages showing
meritorious grounds one, two and
three, and attached affidavit of
- 1 of 2 -

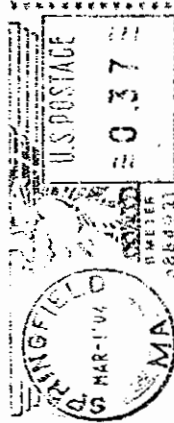
ALL Perhaps local attorney JEAN M. Fielding who
is a recognized post-conviction expert or
John Thompson or Linda Thompson or attorney
JOHN S. FERRARA who has Hill case experience, is

MARIE G. MAZZA, ESQUIRE
Clerk of Courts
Hampden Superior Court
P.O. BOX 559
Springfield, MA 01102-0559

Sjs

LEGAL

13



Luis F. Rivera, Jr. W-52832
P.O. Box 100
South Walpole, MA 02071

02071+0100 01

The Commonwealth of Massachusetts
BERKSHIRE DIVISION
Superior Court Department
76 East Street
Pittsfield, MA 01201
Tel. (413) 499-7487

September 19, 2003

Mr. Raymond Thomas
MCI Cedar Junction
P.O. Box 100
S. Walpole, MA 02071

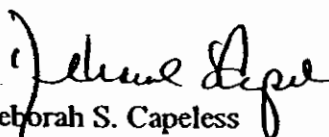
RE: Commonwealth Vs. Raymond Thomas
Indictment No. 980922

Dear Mr. Thomas:

Enclosed please find a certified copy of the endorsement of Judge Ford dated August 30, 2002 denying your Rule 30 Motion for New trial without a hearing which was mailed to you last year.

After reviewing your file, no action was taken on your motion for expedited hearing on your Rule 30 Motion filed on April 3, 2003 being that your motion was denied on August 30, 2002.

Very truly yours,


Deborah S. Capeless
Clerk

DSC/ds

Enc.

Raymond T. Thomas

vs.

[illegible]

MARIE G. MAZZA, ESQUIRE
CLERK OF COURTS



**Hampden Superior Court
Commonwealth of Massachusetts
Office of the Clerk of Courts**

Office (413) 735-6016 or 6017
Fax (413) 737-1611 TTY (413) 827-9379

FIRST ASSISTANT CLERK
DAVID M. CHERNOCK

ASSISTANT MAGISTRATE
STEPHANIE A. ROSCOE, ESQ.

ASSISTANT CLERKS
KEVIN J. CLAFFEY, ESQ.
CHERYL A. COSSABOOM
MARY C. CULLINAN
WILLIAM L. EASON
JOHN J. FITZGERALD
LAURA S. GENTILE, ESQ.
TERRENCE C. GINLEY
DAPHNE G. MOORE, ESQ.

ADDRESS ALL COMMUNICATIONS TO:
CLERK, SUPERIOR COURT
DEPARTMENT OF THE TRIAL COURT
HALL OF JUSTICE
P.O. BOX 559, 50 STATE STREET
SPRINGFIELD, MASSACHUSETTS 01102-0559

March 12, 2004

Luis F. Rivera, Jr., W-52832
P.O. Box 100
S. Walpole, Mass. 02071

RE.: COMMONWEALTH VS. LUIS RIVERA
Hampden Superior Court case nos. 91-2247-2251

Dear Sir:

Please be advised we are in receipt of your notice of appeal and the same has been filed and docketed in your case. However, you are referred to M.G.L. C.278, §33E for determining proper venue and procedure for filing such an appeal.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Nancy Ann Kedzior".

Nancy Ann Kedzior
Deputy Assistant Clerk

NAK/

EXHIBIT - B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

LUIS RIVERA,
Petitioner

v.

DAVID NOLAN,
Respondent

Civil Action No. 04-12717-RCL

ORDER ON RESPONDENT'S MOTION TO DISMISS THE PETITION

This is a case arising from a petition filed by Luis Rivera (the "petitioner") for habeas corpus relief pursuant to 28 U.S.C. §2254. The petition asserts, as grounds for relief, ineffective assistance of appellate counsel in the failure of counsel to argue meritorious grounds for appeal; misstatements of the prosecution's burden of proof both by the prosecutor, in closing argument, and in the final instructions given to the jury by the court; ineffective assistance of trial counsel in the failure of counsel to call certain witnesses and to object to the admission of certain evidence; prosecutorial misconduct in the procuring and offering of false testimony and in the concealment of exculpatory evidence. The petitioner asserts all of these grounds pursuant to the Sixth and Fourteenth amendments to the Constitution of the United States. The respondent has moved to dismiss the petition on the ground that it is time barred.

The Antiterrorism and Effective Death Penalty Act ("AEDPA") imposes a one-year limitation period with respect to habeas petitions filed in federal court by state prisoners; the period begins to run from "the date on which the judgment [of conviction] became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C.

2244(d)(1)(A). The record in this case indicates that, following the affirmance of the petitioner's conviction by the Supreme Judicial Court of Massachusetts in 1997, *Commonwealth v. Rivera*, 424 Mass. 266 (1997), the petitioner applied for a writ of certiorari from the Supreme Court of the United States. The Court denied that petition on October 13, 1998. *Rivera v. Massachusetts*, 525 U.S. 934 (1998). Thus under AEDPA, the petitioner's conviction became final on October 13, 1998 and he had one year from that date, or until October 13, 1999, to file his habeas petition. The petition, however, was not filed until December 28, 2004, more than five years after the expiration of the period of limitations.

The petitioner points to a motion for new trial which he filed on November 10, 2003, presumably to suggest that the motion offers a reprieve from the running of the limitation period. AEDPA provides that "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C.

§2244(d)(2). The problem with the petitioner's argument, however, is obvious: by the time the motion for new trial was filed in 2003, the limitation period had already expired. Specifically, on October 13, 1999, one year after the petitioner's conviction became final by the denial of the application for certiorari, AEDPA foreclosed federal habeas review. Thus, by the time the motion for new trial was filed, there was no limitations to suspend; the period had run. The motion for new trial could not resuscitate the present habeas claim once the limitation period had completely run its course.

Accordingly, the respondent's motion to dismiss the petition is granted. Because the disposition of the petition here is a result of straightforward application of the AEDPA statute of

limitations, the petition raises no issue of a constitutional magnitude about which jurists of reason could disagree. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). The petitioner, therefore, has made no substantial showing of the denial of a constitutional right, *id.*, and I will not issue a certificate of appealability. The clerk shall enter judgment for the respondent dismissing this action.

SO ORDERED.

/s/ REGINALD C. LINDSAY

United States District Judge

DATED: June 17, 2005

EQUITABLE TOLLING

1. The doctrine that the statute of limitations will not bar a claim if the plaintiff, despite diligent efforts, did not discover the injury until after the limitations period had expired. Equitable tolling does not require misconduct by the defendant. [cases: limitation of actions (key) 104.5. C.J.S. limitations of action §§ 85-86, 121].

2. The doctrine that if a plaintiff files a suit first in one court and then refiles in another, the statute of limitations does not run while the litigation is pending in the first court if various requirements are met. Among those requirements are (1) timely Notice of the Defendant; (2) No prejudice to the defendant; and (3) Reasonable and good faith conduct on the part of the plaintiff.